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No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

— against —

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does Section 14(e) of the Williams Act prohibit manipulative acts, even though the manipulator discloses those acts after they occur, at a time when it is too late to have the market freely react and for the victims of the wrongful acts to take corrective market action?

2. Did a manipulative act occur when the maker of a tender offer (i) for the sole purpose of protecting the target company insiders at the expense of tendering shareholders, wrongfully withdrew that offer, which had been opposed by the insiders, after it had been fully subscribed for, pursuant to an agreement between the maker and the target company insiders and (ii) immediately thereafter make a substituted tender offer on the same terms and conditions as the previous offer, allowing those insiders to tender their own target company shares while those who previously tendered all their shares would

now have those shares significantly reduced under the new offer?

3. Whether the remedies of those who tendered and were injured can be left to conflicting and inconsistent remedies of various states and whether any such remedy is not precluded?

THE PARTIES

The parties before this Court are those set forth in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	(i)
The Parties	(iii)
Tables of Authorities	(vii)
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	5
Summary of Argument	12
Argument	15
I. MANIPULATIVE OR FRAUDULENT ACTS IN CONNECTION WITH A TENDER OFFER ARE ACTIONABLE UNDER SECTION 14(e) OF THE WILLIAMS ACT IN THE ABSENCE OF DECEPTION OR NONDISCLOSURE	15
A. The Plain Language Of The Statute Prohibits Manipulative Or Fraudulent Acts Without The Presence Of Deception Or Nondisclosure	15

B. To The Extent That Congressional Intent Has Been Evidenced, This Intent Supports The View That Manipulative And Fraudulent Acts Are Separate Wrongs That Do Not Require Deception Or Nondisclosure And This Construction Is In Accord With Securites Exchange Commission Practice And Applicable Authorities 25

C. To Require Deception Or Nondisclosure As An Element Of Wrongful Conduct Is To Relegate Injured Parties Of Manipulative And Fraudulent Acts To Inappropriate, Inconsistent And Constitutionally Inadequate Remedies 51

II.

THE ACTS AT BAR VIOLATED SECTION 14(e) OF THE WILLIAMS ACT, EVEN THOUGH DISCLOSURE WAS MADE 57

A. Collusive Agreement To Withdraw Fully Subscribed Tender Offer And Substitute Offer Detrimental To Target Company Shareholders Violates Section 14(e) Of The Williams Act, Even If Disclosed 59

B. Sale Of Target Company Stock And A Lock-Up Option By Target Management During Pending Tender Offer Violates Section 14(e) Of The Williams Act, Even If Disclosed Where Free Market For Target Shares Is Artificially Limited. 65

C. Failure To Disclose Golden Parachute Contracts Awarded To Target Management And Other Tender Offer Manipulation Violates Section 14(e) Of The Williams Act And Applicable SEC Rules 71

TABLES OF AUTHORITIES

Cases

	Page
Allico Nat'l Corp. v. Amalgamated Meat Cutters, 397 F.2d 727 (7th Cir. 1968)	35
A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967)	34, 60, 64
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Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), reh'g denied, 423 U.S. 884 (1975)	15, 29
Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir. 1983), cert. denied, 104 S.Ct. 550 (1983)	47, 48
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International Shoe Co. v. Washington, 326 U.S. 310 (1945) 56

Jefferson County Pharm. Assn., Inc. v. Abbott Labs., 460 U.S. 150 (1983) 20

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Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982) 44, 45, 61, 68

Moore v. Crawford, 130 U.S. 122 (1889) 35

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 57

Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228 (D.C. Cir. 1949) 34

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Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 21, 48

Schreiber v. Burlington Northern, Inc., 568 F.Supp. 197 (D.Del. 1983) 2

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SEC v. National Securities Inc., 393 U.S. 453 (1969) 30

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Securities Exchange Act of 1934 §10(b), codified as amended at 15 U.S.C. §78j(b) (1983) 29, 30, 33, 39

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Securities Exchange Act of 1934 §14(e) (Williams Act), codified as amended at 15 U.S.C. §78n(e) (1983) 11, 15, 17, 27

Mail Fraud Statute §1, codified as amended at 18 U.S.C. §1341 (1976) 36

Judiciary Act, codified as amended at 28 U.S.C. §1254(1) (1983) 2

Rules

Federal Rules of Civil Procedure 12(b)(6) 5, 11

Securities and Exchange Commission Rule 10(b)-5, codified at 17 C.F.R. §240.10b-5 (1984) 29, 39

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No. 83-2129

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

BARBARA R. SCHREIBER,

Petitioner

- against -

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware, dismissing the complaint pursuant to Rule

12(b)(6) F.R.C.P. and before discovery, is reported at 568 F.Supp. 197 and is set forth in the Joint Appendix ("JA") at JA-21 through JA-47. The opinion of a panel of the United States Court of Appeals for the Third Circuit, affirming the District Court is reported at 731 F.2d 163 and is set forth at JA-51 through JA-59.

JURISDICTION

On April 2, 1984, a panel of the Court of Appeals for the Third Circuit entered its decision, affirming the District Court's dismissal of the complaint. A timely petition for a Writ of Certiorari was filed on June 26, 1984. Certiorari was granted on October 1, 1984. Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which

> shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

The Commerce Clause of the United States Constitution (U.S. Const. art. I, §8, cl. 3):

> The Congress shall have Power...
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

* * *

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend. XIV) states, in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(e):

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which there are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

STATEMENT OF THE CASE

This action arises out of a tender offer, its wrongful termination after it was fully subscribed, and the substitution of a revised tender offer under terms and conditions favoring target company management and the tender offeror at the expense of target shareholders who tendered their shares in the initial tender offer.**

Petitioner in this action is Barbara R. Schreiber, suing on behalf of herself and all other similarly situated shareholders of respondent, The El Paso Company ("El Paso"), who tendered their shares to respondents Burlington Northern, Inc. ("Burlington") and R-H Holdings Corporation ("R-H"), pursuant to their

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**Respondents never answered the complaint. Respondent's motion to dismiss under Rule 12(b)(6) F.R.C.P., therefore, assumed the truth of the substantive allegations of the complaint. Those allegations are the basis of the facts submitted herein and were the basis on which the Courts below acted (JA-24).

tender offer, dated December 21, 1982. The remaining respondents are the individual directors and officers of El Paso.

On December 21, 1982, respondent Burlington, through its wholly owned subsidiary, R-H, made a hostile tender offer ("December tender offer") for 25.1 million shares of El Paso stock at $24 per share, which if accepted, would have given Burlington/R-H majority control of El Paso (JA-10). The December tender offer had a deadline of December 30, 1982 and purported to permit the termination of the offer upon the occurrence of specified conditions which the complaint alleged were not applicable at bar (JA-11). On December 29, 1982, petitioner tendered her El Paso shares in response to the December tender offer, and by the December 30, 1982 deadline, the tender offer was fully subscribed, and Burlington/R-H held majority control of El Paso (JA-10).

Up to this point, El Paso management had urged rejection of the December tender offer on the stated ground that the

amount offered was "inadequate". El Paso management also implemented a number of defensive measures in opposition to the December tender offer, including issuing shares of preferred stock, which led to litigation between Burlington and El Paso before the Chancery Court in Delaware (JA-11). Once the December 30, 1982 deadline had passed, and it became clear that Burlington had succeeded in the December tender offer and El Paso was going to lose the Delaware litigation, El Paso management then entered into private negotiations with Burlington/R-H (JA-11). As a direct result of these negotiations, which were not contemporaneously disclosed to El Paso shareholders, respondents caused the December tender offer to be terminated and a revised tender offer submitted to the El Paso shareholders (JA-12).

The revised tender offer ("January tender offer") was made effective immediately upon the cancellation of the fully subscribed December tender offer, and before any of the shareholders who ten-

dered in the December offer had their shares returned (JA-27).

The January tender offer differed from the December offer in a number of significant respects. In contrast to the December tender offer which sought a total of 25.1 million shares of El Paso stock from the public, the revised January offer sought only 21 million shares (JA-12). As part of the negotiations which led to the termination of the December tender offer, El Paso management agreed to sell some 4.16 million shares of authorized, but as yet unissued stock, to Burlington/R-H at $24 per share, which would permit Burlington to assume control of El Paso upon the purchase of only 21 million shares through the January tender offer (JA-12). In order to completely assure the success of Burlington/R-H in the January tender offer, El Paso management also granted Burlington/R-H an option to purchase an additional 4.95 million shares of El Paso stock at $24 per share (JA-13). In exchange for these agreements, Burlington/R-H agreed to terminate the fully subscribed December

tender offer and to make a revised tender offer to permit El Paso management to tender shares that had been withneld in the "hostile" December offer (JA-12). Burlington/R-H also agreed to ratify certain "Golden Parachute" contracts for El Paso management made during the pendency of the December offer (JA-13). Once these collusive agreements were in place, El Paso management then recommended approval of the January tender offer even though the January tender offer was made for the same "inadequate" price as the prior December tender offer.

The cancellation of the fully subscribed December tender offer and the immediate issuance of the revised January tender offer caused substantial damage to the class. The termination of the December tender offer, combined with the reduced number of shares sought in the revised offer, and the fact that El Paso management approved and participated in the revised offer caused the January tender offer to be greatly over-subscribed, subjecting all shares tendered to extensive

proration.** The termination of the December tender offer, the sale of stock and options and the issuance of the revised January offer was disclosed to the El Paso shareholders only as a fait accompli. The market price of El Paso stock having already reacted to and having been set by the December offer had insufficient opportunity to respond as a free market before the January offer impacted and expired. Indeed, as a result of the hastily resubmitted January offer, the sale of El Paso stock and the option to acquire more, no "white knight" could even contemplate offering a counter bid. As a result, the El Paso shareholders were deprived of their right to exercise any free and unrestricted choice in the tender of their shares.

Petitioners brought suit in Federal District Court alleging violations of

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**More than 40 million shares were tendered in the January tender offer. R-H accepted only 21 million shares for payment on February 8, 1983 (JA-27).

Section 14(e) of the Williams Act, 15 U.S.C. §78n(e) (1982) and pendent state law claims. The United States District Court for the District of Delaware dismissed the complaint pursuant to Rule 12(b)(6) F.R.C.P. and prior to discovery for failure to state a claim under Section 14(e) of the Williams Act (JA-21). The District Court held that deception is an essential element of any claim under Section 14(e) of the Williams Act, and since no deception was present, there could be no claim (JA-40). It did not consider any evidence of manipulation nor was petitioner afforded the opportunity to submit evidence on the issue of manipulation. Indeed, petitioner was not permitted any discovery.**

**Respondents improperly submitted to the District Court El Paso's filings under Schedule 14D-9 which contained their self-serving declarations of good faith. The Courts below did not consider this submission, and plaintiff had no opportunity to contest the claims. At best, the declarations raised nothing more than disputed fact issues.

A panel of the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court (JA-51). The Third Circuit, although troubled by the conduct alleged in the complaint, affirmed the District Court's holding that deception was an essential element of a claim under Section 14(e) of the Williams Act (JA-58).

SUMMARY OF ARGUMENT

The Williams Act was conceived by Congress to establish a delicate balance between target company management and the bidder for the protection of target company investors. Section 14(e) of the Williams Act mandates full disclosure and expressly proscribes "fraudulent, deceptive, or manipulative acts or practices" committed in connection with a tender offer. The plain language of Section 14(e) prohibits each type of unlawful act as a separate and distinct category of misconduct. Deception or nondisclosure is, therefore, not a required element to establish a claim for fraudulent or manipulative acts committed in connection

with a tender offer. Congressional intent and legislative history, as well as SEC practice, support this conclusion.

Respondents violated Section 14(e) of the Williams Act by terminating a fully subscribed tender offer and substituting an inferior offer for the personal profit of target company management and the bidder at the direct expense of target company investors. The sale of unissued target company stock and lock-up options to the favored bidder served to deter competitive offers and deprive target investors of a free market for their shares. Such deliberate misconduct, committed in connection with a tender offer, constitutes a fraudulent or manipulative act in violation of Section 14(e) even though disclosed.

The decision of the Courts below to dismiss the federal claims raised by the petitioner must be reversed because both Courts erroneously held that deception or nondisclosure is an essential element to any claim brought under Section 14(e). The decision of the Courts below must be reversed for the additional reason that

such a construction of the Williams Act impermissably relegates target investors to the inappropriate, inconsistent and Constitutionally defective remedies of the various states. State court adjudication of nationwide class action claims brought under the Williams Act is prohibited by the Supremacy Clause, the Commerce Clause and the Due Process Clause of the United States Constitution. In enacting Section 14(e), Congress sought to establish uniform and consistent standards for the resolution of tender offer disputes. To permit litigation of tender offer misconduct under the differing laws of each state would lead not only to inconsistent and uncertain results, but would also improperly burden interstate commerce by destroying the delicately balanced regulatory scheme established by Congress in the Williams Act.

Accordingly, it is respectfully submitted that the decisions of the Court below must be reversed and petitioner's complaint reinstated.

I.

ARGUMENT

MANIPULATIVE OR FRAUDULENT ACTS IN CONNECTION WITH A TENDER OFFER ARE ACTIONABLE UNDER SECTION 14(e) OF THE WILLIAMS ACT IN THE ABSENCE OF DECEPTION OR NONDISCLOSURE

A. The Plain Language Of The Statute Prohibits Manipulative Or Fraudulent Acts Without The Presence Of Deception Or Nondisclosure

The Court has repeatedly observed, "[t]he starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975), reh'g denied, 423 U.S. 884 (1975) (Powell, J. concurring). The Williams Act, of which Section 14(e) is a part, was enacted in 1968 as an amendment to the Securities Exchange Act of 1934 ("1934 Act"). Pub.L.No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§78m (d)-(e), 78n(d)-(f) (1983)).

Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), expressly provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

It is evident from the plain language of the statute, that Section 14(e) of the Williams Act is composed of three separate and distinct statutory commands. The first part of Section 14(e) is clearly aimed at ensuring truthful disclosure through the prohibition of misrepresentations, omissions or misleading statements made in connection with a tender

offer. The second component of Section 14(e) is clearly aimed at separate substantive conduct. It specifically prohibits "fraudulent, deceptive, or manipulative acts or practices" committed in connection with a tender offer.

The third component, added as an amendment to the Williams Act in 1970, Pub. L.No. 91-567, §5, 84 Stat. 1497 (1970) (codified as amended at 15 U.S.C. §78n (e)(1983)), specifically empowers the Securities and Exchange Commission ("SEC") to define and prescribe means to prevent fraudulent, deceptive, or manipulative acts in connection with a tender offer. The inclusion of the second and third parts of Section 14(e) clearly indicates Congressional intent that the Williams Act function as more than a disclosure provision.

The prohibition, in the second subparagraph of Section 14(e), clearly applies to three separate categories of conduct. The use of the word "any" to refer to fraudulent, deceptive, or manipulative acts indicates that Congress intended to prohibit all three categories

of misconduct, whether or not all three, only two or a single element was present in any particular case. The use of the disjunctive "or" to separate the terms "fraudulent, deceptive" from "manipulative" underscores this conclusion. If Congress had truly intended the prohibition of manipulative acts to require elements of deception, the use of the conjunctive "and" would have been far more appropriate.

This Court has consistently adhered to the view that Courts are "...obliged to give effect, if possible, to every word that Congress used... Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings..." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (citations omitted) (emphasis added).

In the context of the Williams Act, the use of the disjunctive "or" evidences Congressional intent that each subsection of the second part of Section 14(e) "proscribes a distinct category of misconduct." United States v. Naftalin, 441 U.S. 768, 774 (1979). If Congress had

intended deception to be a required element under all three parts, there could be no rational explanation for the use of the disjunctive "or" as opposed to "and" to separate fraudulent or deceptive acts from those which are only manipulative. The fact that Congress employed the same disjunctive "or" to separate manipulative acts from fraudulent or deceptive conduct in the third part of Section 14(e), lends further support to the view that Congress expressly intended to prohibit manipulative acts as a distinct category of misconduct separate from both fraudulent or deceptive acts.

This Court has always recognized that the plain language of the statute is to be obeyed and deferred to as opposed to some perceived intent or gloss based upon a belief as to Congressional desires. Thus, in Ernst & Ernst v. Hochfelder, the Court stated:

> To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another....After all, legislation when not ex-

> pressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

425 U.S. 185, 199 n.19 (1976), reh'g denied, 425 U.S. 986 (1976) (citations omitted). Accord, Jefferson County Pharm. Assn. v. Abbott Labs., 460 U.S. 150, 157 (1983); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

The term "manipulative" is not defined in the Williams Act. Moreover, there is no clear evidence regarding the Congressional definition of manipulation in the William Act. In the absence of any proof that Congress specifically intended to limit the term "manipulative" in the Williams Act to conform to a particular technical meaning, it must be presumed that Congress intended the term to be applied consistent with its standard or ordinary meaning. Indeed, as the Court held in another context: "No doubt Congress meant to prohibit the full range of ingenious devices that might be used

to manipulate securities prices." Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977).

Congressional concern over manipulation is reflected throughout the legislative history to the Securities Exchange Act of 1934. In its outline of the 1934 Act, the House Committee on Interstate and Foreign Commerce stated:

> The chief provisions of the bill may be grouped under six headings: (a) control of credits; (b) control of manipulative practices; (c) provision of adequate and honest reports to securities holders by registered corporations; (d) control of unfair practices of corporate insiders; and (e) control of exchanges and over-the-counter markets; (f) administration.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934) (emphasis added). It is clear, therefore, that the 1934 Act is directed at a much wider purpose than mere disclosure. The House Report discussing the bill referred to the multitude of abuses which the bill was intended to cure. The general purpose of the 1934 Act, according to the House Report, was to condemn the "...unnecessary, unwise, and

destructive speculation" which threatened the essential elements of our economic system. H.R. Report No. 1383, supra, at 2-3. If, indeed, there is any single overriding purpose evident from the legislative history of the Securities Exchange Act of 1934, it is the protection of the public investor. As President Roosevelt wrote to Congress during consideration of the 1934 Act:

> I therefore recommend to the Congress the enactment of legislation providing for the regulation by the Federal Government of the operations of exchanges dealing in securities and commodities for the protection of investors, for the safeguarding of values, and, so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation.

Letter of President Franklin D. Roosevelt (Feb. 9, 1934), reprinted in H.R. Rep. No. 1383, supra, at 2 (emphasis added).

According to the standard dictionary definition of "manipulation", this term refers generally to the "use of unfair, scheming or underhanded methods especially for one's own advantage". Webs-

ter's Third New International Dictionary 1376 (1971). In the context of the securities markets, the term "manipulation" has been customarily used to refer to substantive conduct which artificially affects the market for or price of a security. See Harris v. United States, 48 F.2d 771, 774 (9th Cir. 1931); United States v. Brown, 79 F.2d 321, 325 (2d Cir. 1935); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 795 (2d Cir. 1969) cert. denied, 400 U.S. 822 (1970). Classic examples of market manipulation include stock pools, wash sales and matched orders. 3 L.Loss, Securities Regulation 1529-73 (2d Ed. 1961). These practices are considered unlawful manipulative acts because they artificially affect the market for, or price of, securities through means unrelated to the natural forces of supply and demand. Note, Target Defensive Tactics As Manipulative Under Section 14(e), 84 Colum.L.Rev. 228, 238 (1984) (hereinafter cited as "Target Defensive Tactics"). Indeed, at common law, courts prohibited schemes that interfered with the free

market mechanism. Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349, 1360 (N.D.Tex. 1979). Since it is "the essence of the economic function of a securities exchange that it be a free market", manipulative acts must be prohibited. 3 L. Loss, supra, at 1531. Public investors are entitled to a "natural market" that is free from tampering, and such unlawful, manipulative acts do not always involve nondisclosure or deception**. Note, Manipulation of the Stock Markets Under the Securities Laws, 99 U.Pa.L.Rev. 651, 652-53 (1951); Junewicz, The Appropriate Limits of Section 14(e) Of The Securities Exchange Act of 1934, 62 Tex.L.Rev. 1171, 1186 (1984) (hereinafter cited as "Junewicz").

Section 14(e) also prohibits another category of wrong: fraudulent acts. Here, too, Congress did not provide any specific definition of the term "fraudulent". The inclusion of language to specifically proscribe fraudulent or manipulative acts indicates that Congress did not intend deception to be the sole test under Section 14(e). We shall show below that the bar against fraudulent or manipulative acts does not require the element of deception.

**Professor Loss noted the 1934 Act did not modify the common law concept of manipulation, but incorporated it. Id. at 1541.

We submit that the decisions below, in requiring deception, ignored the plain language of Section 14(e).

B. To The Extent That Congressional Intent Has Been Evidenced, This Intent Supports The View That Manipulative And Fraudulent Acts Are Separate Wrongs That Do Not Require Deception Or Nondisclosure And This Construction Is In Accord With Securities Exchange Commission Practice And Applicable Authorities

This Court has already concluded that the purpose of the Williams Act was to protect public investors and to avoid favoring either management or the takeover bidder. See, Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29 (1977) reh'g denied, 430 U.S. 976 (1977); Edgar v. MITE Corp., 457 U.S. 624, 633-34 (1982). We submit that manipulative and

fraudulent acts are separate wrongs from that of deception, and the legislative history of Section 14(e) fully supports this conclusion.

While there are Congressional statements directed to the disclosure aspects of the Williams Act,** Congress was aware that contested tender offers take place in the context of severe pressure and extreme tactics designed to force stockholders of the target company to make a decision. The inclusion of specific language to prohibit fraudulent, deceptive, or manipulative acts as separate from the disclosure requirements of Section 14(e) indicates that Congress recognized disclosure alone would not provide

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**The Williams Act was originally introduced as a measure to protect against corporate raiders who were able to gain control of target companies in complete secrecy. 111 Cong.Rec. 28,257-60 (1965). As the legislation evolved, however, Congress not only mandated full disclosure, but also specifically prohibited acts or practices by any party to avoid "tipping the scales" in favor of either target management or the bidder. 113 Cong.Rec. 24,662-66 (1967).

sufficient protection for public investors in the tender offer context.

Apart from the language of the statute as originally enacted, it is significant to note that in 1970, Congress added the last phrase: "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Pub.L.No. 91567, §5, 84 Stat. 1497 (1970) (codified as amended at 15 U.S.C. §78n(e) (1982)). Thus, Congress reiterated its view that both fraudulent and manipulative acts were to be treated as conceptually distinct from deception. Indeed, granting the SEC rule-making power to prevent "fraudulent, deceptive, or manipulative" acts or practices is a strange way to deal with disclosure only. A more direct method for investing SEC with rule-making power over deception, as one commentator noted, would have provided "The Commission may adopt rules to ensure that full and fair disclosure is made to shareholders faced

with a tender offer." Junewicz, supra, at 1175.

Moreover, if Congress intended to limit the Williams Act solely to disclosure questions, it need not have amended the Act in 1970 to provide the last sentence. Section 14(d)(4) of the 1934 Act, originally enacted as part of the Williams Act, Pub.L. 90-439, §3, 82 Stat. 454 (1968), empowered the SEC to regulate the conduct of tender offer participants. This power included the regulation of disclosures made by all who solicit acceptances or rejections of tender offers. 15 U.S.C. §78n(d)(4)(1983). See, Canadian Pacific Enter., Inc. v. Krouse, 506 F.Supp. 1192, 1199 (S.D. Ohio 1981); Note, Defensive Tactics Employed By Incumbent Managements In Contesting Tender Offers, 21 Stan. L. Rev. 1104, 1114, n.54 (1969). Under this section, the SEC has adopted detailed rules and schedules governing disclosure in tender offers. See, e.g., Rule 14(d)-4 (codified at 17 C.F.R. §240.14d-4) (1984); Schedule 14D-9 (codified at 17 C.F.R. §240.14d-101) (1984). These schedules require complete

disclosure of "...material information, if any, as may be necessary to make the required statements ... not materially misleading...". See Schedule 14D-1, Item 10(f), codified at 17 C.F.R. §240.14d-100 (1984). Under Schedule 14D-9, these disclosures require, inter alia, the inclusion of management's reasons for its position on the tender offer and any arrangements or understandings between target management and the tender offeror. Hence, Section 14(e)'s rule-making authority was not crucial to the SEC's power to regulate disclosure in view of Section 14(d)(4).

Of equal importance is the fact that at the time of the enactment of the Williams Act in 1968 and its amendment in 1970, there was no doubt whatsoever that Section 10(b) and Rule 10(b)-5 applied to tender offer disclosures.** See, 5B A.

**Although this Court subsequently restricted the scope of Section 10(b) and Rule 10(b)-5 to purchasers and sellers in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), that decision was not yet before the Congress at the time of the enactment of the Williams Act.

Jacobs Litigation and Practice Under Rule 10(b)-5, Sections 185-193.18(f) (rev. ed. 1984). In fact, Section 10(b) was regularly applied to tender offers prior to the adoption of Section 14(e), and no Court ever held that it was inapplicable. See, e.g., SEC v. National Securities Inc., 393 U.S. 453, 468 (1969) (both Section 10(b) and Section 14 regulate fraudulent practices).

Significantly, at the time of the enactment of the Williams Act, Congress had before it the testimony of Honorable Manuel F. Cohen, then Chairman of the SEC, that the Commission should be provided with adequate tools "... to deal effectively with the various techniques ... to seek or to prevent takeover bids and ...adequate authority to ... give the investor the fairest possible opportunity to make his own investment decisions..." See Williams Act: Hearing On H.R. 14475 and S. 510 Before the Subcomm. On Commerce And Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 11 (1968) Congress also had the report of the Senate Committee on

Banking and Currency that the purpose of the adoption of the rulemaking authority under Section 14(e) was "...to allow the Commission to deal more adequately with the sophisticated devices sometimes employed by both sides in contested tender offers..." S.Rep. 1125, 91st Cong., 2d Sess. 6 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 2233, 2238.

During the debates on the 1970 amendments, Congress also had before it the memorandum of the SEC (the Division of Corporation Finance) ennumerating some of the examples of fraudulent, deceptive or manipulative practices used in tender offers. Some of the examples cited did not relate to any element of deception. These included: (i) the bidder's failure to pay promptly for securities purchased or to return promptly securities not to be purchased; (ii) the bidder's failure to withdraw the bid or to make an appropriate announcement that the end of the proration period if the offer is fully subscribed; and (iii) trading on tender offer information by persons receiving the information from the bidder or target

company. See Additional Consumer Protection in Corporate Takeovers: Hearing on S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 12 (1970).

Perhaps most importantly, Congress had the statements of the sponsor.** Senator Williams stated:

> The techniques used in corporate takeovers and tender offers have become increasingly sophisticated and change rapidly. This is particularly true in situations where the takeover is resisted by incumbent management -- industrial warfare develops. Claims and counterclaims, charges and counter-charges are hurled back and forth. Efforts are often made to influence the price of the securities involved. The Commission must be given full rulemaking powers in order to deal with these rapidly changing problems.

**This Court has long held that when statutory words are in doubt, the comments of the statute's sponsors are to be examined. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-5 (1951).

116 Cong.Rec. 3024 (1970) (emphasis added).

The fact that Congress intended to prohibit conduct not involving deception under Williams Act is made even more clear by the inclusion of the bar against fraudulent acts in Section 14(e). This inclusion is to be contrasted with the language of Section 10(b) (codified as amended at 15 U.S.C. §78j(b) (1983)), which only prohibits "any manipulative or deceptive device".** If Congress intended deception to be an essential element under Section 14(e), the word "fraudulent" is clearly inappropriate. The authorities have long recognized that conduct may be fraudulent even though it involves no deception, as in the case

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**Section 10(b) of the Securities Exchange Act of 1934 states that it is unlawful for any person to "use or employ in connection with the purchase or sale of any security...any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe..." 15 U.S.C. §78j(b) (1983).

where fiduciaries breach their fiduciary duty or there is other egregious conduct. See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192-94 (1963); A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967); O'Neill v. Maytag Co., 339 F.2d 764, 769 (2d Cir. 1964); Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 232 (D.C. Cir. 1949); Applied Digital Data Sys., Inc. v. Milgo Electronic Corp., 425 F.Supp. 1145, 1157-58 (S.D.N.Y. 1977) (issuing an injunction under §14(e) to stop Milgo's sale of shares for the "sole purpose" of defeating a tender offer); Royal Indus., Inc. v. Monogram Indus., Inc., [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,863, at 91,137-38 (C.D. Cal. Nov. 29, 1976); cf. Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 422 (S.D.N.Y. 1982) ("[M]anagement [may act] in the best interest of its shareholders even if this will make more difficult the success of a disfavored offeror. The rule might be otherwise on a showing that management is acting for its own interests in violation of its fiduciary duty to its share-

holders."); Joseph E. Seagram & Sons, Inc. v. Abrams, 510 F.Supp. 860, 862 (S. D. N. Y. 1981) (temporary restraining order issued to prevent the directors of the target corporation from carrying out their plan to sell all corporate assets and even destroy its charter to thwart a takeover).

Fraudulent conduct has always been considered to include acts that do not involve misrepresentation or deception. This Court once held that fraud in equity "properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." Moore v. Crawford, 130 U.S. 122, 128 (1889). And when such conduct is intentional and enriches the fiduciary at the expense of the beneficary, it becomes fraudulent at law. See SEC v. Capital Gains Research Bureau, 375 U.S. 180, 192-4 & n.39 (1963); Supt. of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 11, n.7 (1971); Allico Nat'l Corp. v.

Amalgamated Meat Cutters, 397 F.2d 727, 729-30 (7th Cir. 1968); O'Neill v. Maytag Co., 339 F.2d 764, 769 (2d Cir. 1964).

The mail fraud statute, 18 U.S.C. §1341 (1983) also provides analogous support. This statute, inter alia, outlaws the use of the mails to further "any scheme or artifice to defraud". Despite the view that criminal statutes are to be strictly construed, United States v. Culbert, 435 U.S. 371, 379 (1978), it is well-recognized that a knowing breach of fiduciary duty is fraudulent conduct barred by that statute. See, e.g., Post v. United States, 407 F.2d 319, 328-29 (D.C. Cir. 1968) cert. denied, 393 U.S. 1092 (1969). As at least one commentator has observed, case law under the mail fraud statute stands as persuasive authority that neither deception nor nondisclosure are required elements to establish fraud under Section 14(e). Junewicz, supra, at 1201-1205.

Thus, we submit that even if it could be assumed arguendo, that manipulation required deception, fraudulent acts clearly did not.

Finally, it is a well-settled principle of statutory construction that a Court should show "great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965) reh'g denied, 380 U.S. 989 (1965); SEC v. Talley Industries, Inc., 399 F.2d 396, 403 (2d Cir. 1968), cert. denied 393 U.S. 1015 (1968).

While the SEC has thus far not specifically defined the full scope of Section 14(e) manipulation, either by rule or administrative release, it has adopted a number of rules and regulations that are designed to expand the substantive protections afforded shareholders faced with a cash tender offer which are not keyed to deception. See, e.g., Regulation 14E (codified at 17 C.F.R. §240.14e-1 (1984)). Regulation 14(e), which was promulgated under the express authority of Section 14(e) prohibits certain tender offer practices which are made unlawful even in the absence of deception or nondisclosure. Rule 14e-1 (a) for example, declares it to be unlawful for a tender

offeror to hold any tender offer open for less than twenty (20) business days from the date of the first publication of the offer, while sub-part (c) of this Rule declares it to be unlawful for a tender offeror to fail to pay a consideration offered or to return the tendered securities "promptly after the termination or withdrawal of a tender offer". 17 C.F.R. §240.14e-1 (1984). Rule 14e-3 makes it unlawful for a person to trade on inside information knowingly received from a target company or a bidder. 17 C.F.R. §240.14e-3 (1984).

It is beyond dispute that the securities laws "constitute interrelated components of the federal regulatory scheme governing transactions in securities." Ernst & Ernst v. Hochfelder, 425 U.S. at 206. In order to preserve the integrity of this regulatory scheme, it is important that the Williams Act, like other securities legislation, be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. at 195.

Several provisions of the Securities Exchange Act of 1934, in addition to Section 14(e), expressly prohibit manipulation. Section 10b, for example, declares it to be unlawful for any person to use or employ in the purchase or sale of a security "any manipulative or deceptive device or contrivance" which contravenes SEC rules and regulations. 48 Stat 891 (codified as amended at 15 U.S.C. §78j(b) (1982)). In construing Section 10b and Rule 10(b)-5, the Court, in Ernst & Ernst v. Hochfelder, and Santa Fe Industries, Inc. v. Green, looked to Section 9 of the 1934 Act which prohibits manipulation of security prices by the use of such practices as wash sales, matched orders and rigged prices. (425 U.S. at 205, n.25; 430 U.S. at 476; Section 9 of the 1934 Act) (codified at 15 U.S.C. §78i (1982). While parts of Section 9 relied upon by the Court do require nondisclosure, misrepresentation or deception as an element of the statutory violation, see, e.g., Sections 9(a)(1), (2) and (4) (codified at 15 U.S.C. §78i (a)(1), (2), and (4)) 1983)), it is equally clear that nondis-

closure is not an essential element under Sections 9(a)(3), (5) and (6). Indeed, as one commentator recently observed, public disclosure of a scheme to stablize the price of a security in violation of Section 9(a)(6) or a scheme to raise or depress the price of a security in violation of Section 9(a)(3) or (5) may serve to promote rather than curtail this type of unlawful manipulative conduct. Junewicz supra, at 1184-85 (1984).

Federal law also specifically prohibits manipulation in a number of contexts outside of the securities laws. The Commodity Exchange Act, codified at 7 U.S.C. §9 & 13(b) (1983), for example, prohibits market manipulation. Manipulation in that context has been defined as the creation of an artificial price by planned action. See Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), cert. denied, sub nom. Cargill, Inc. v. Butz, 406 U.S. 932 (1972); General Foods Corp. v. Brannan, 170 F.2d 220, 231 (7th Cir. 1948). In the antitrust context, the Court has defined unlawful market manipulation as the creation of an artificial

effect which prevents free market competition. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

There is no requirement in either of these contexts for the manipulation to be effected through deception or nondisclosure. As one Court stated, the test of manipulation must be a practical one because the "methods and techniques of manipulation are limited only by the ingenuity of man". Cargill, Inc. v. Hardin, 452 F.2d at 1163.

We submit that the common denominator connecting all improper practices under the term "unlawful manipulation" is the fact that all such unlawful acts involve the deliberate creation of an artificial market effect for the purpose of personal gain.

The commentators have recognized that unlawful manipulation under Section 14(e) does not require deception. See, e.g., Junewicz, supra, at 1174; Target Defensive Tactics, supra at 252; Weiss, Defensive Responses to Tender Offers And The Williams Act's Prohibition Against Manipulation, 35 Vanderbilt L.Rev. 1087, 1098

(1982); Note, Takeover Developments - Defining "Tender Offer" and "Manipulation" Under The Williams Act, 40 Wash. & Lee L.Rev. 1199, 1224 (1983); Note, Section 14(e) of The Williams Act: Can There Be Manipulation With Full Disclosure Or Was The Mobil Court Running On Empty, 12 Hofstra L.Rev. 159, 179 (1983); Note, Mobil Corp. v. Marathon Oil Co. - The Decision And Its Implications For Future Tender Offers, 7 Corp.L.Rev. 233, 250 (1984).

Section 14(e) of the Williams Act was enacted to protect the investor in the limited context of the cash tender offer by requiring disclosure of material information and also by expressly prohibiting fraudulent, deceptive, or manipulative acts which could "frustrate the exercise of an informed choice". Edgar v. MITE Corp., 457 U.S. 624, 634 (1982). It is clear that Congress intended Section 14(e) and the SEC to function as the guardians of free market competition in a tender offer context. While it is true that many acts of deception may be remedied by timely disclosure, to read into

the statute a requirement of deception or nondisclosure as an essential element of any manipulative or fraudulent act would defeat the very purpose of Section 14(e) by condoning manipulation of the tender offer process as long as the manipulation is disclosed. Such a reading of Section 14(e) ignores the plain language of the statute, its legislative history, administrative treatment and the underlying policies reflected in the Williams Act. Where disclosure of a manipulative act is made under conditions which deprive the investor of his right to exercise an informed choice, then disclosure cannot remedy the harm which Congress specifically addressed in its unqualified prohibition of manipulative acts. Indeed, one's awareness of being manipulated does not necessarily permit avoidance of the manipulative conduct. See, Note, Mobil Corp. v. Marathon Oil Co. -- The Decision And Its Implications For Future Tender Offers, 7 Corp. L.Rev. 233, 250 (1984).

Moreover, it is equally certain that the prohibition against fraudulent con-

duct is not remedied by subsequent disclosure.

The carefully reasoned authorities clearly support the foregoing conclusion. In Mobil Corp. v. Marathon Oil Company, 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982), Mobil had initiated a tender offer for control of Marathon, which Marathon directors sought to defeat. The target directors first endeavored to have the hostile bid enjoined on antitrust grounds to gain time until a more favorable bidder could be found. Marathon then granted U.S. Steel Corporation an irrevocable stock option for 10 million shares of Marathon stock and a conditional option to purchase the target's interest in the Yates Oil field which was exercisable only if another bidder won control of Marathon. Mobil brought suit to enjoin the grant of the options as a "manipulative act" in violation of Section 14(e). The District Court refused to enjoin the options, but the Sixth Circuit reversed and determined that the options were manipulative in violation of Section 14(e) even though

the options were disclosed. 669 F.2d at 376.

The Sixth Circuit concluded that the lockup options, taken either individually or together, were manipulative within the meaning of Section 14(e) because they "...not only artificially affect, but for all practical purposes completely block, normal healthy market activity and, in fact, could be construed as expressly designed solely for that purpose." Id. at 374. On the issue of disclosure, the Sixth Circuit determined that "to find compliance with Section 14(e) solely by disclosure of a manipulative device as a fait accompli would be to read the "manipulative acts and practices" language completely out of the Williams Act." Id. at 377. The Sixth Circuit concluded that Section 14(e) requires more than full disclosure, and thus, deception or nondisclosure is not an essential element to establish a manipulative act in violation of Section 14(e). Id. at 376-77. Accord, Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, 1086 (9th Cir. 1982).

Such a view, moreover, correctly reflects common law. At common law, schemes which interfered with the free market mechanism were barred as manipulative. See 3 L.Loss, supra, 1533-39, 1538-9.

The result of these authorities makes common sense. Tender offers are often made and contested in an atmosphere of extreme pressure. The shareholders of the target company are frequently forced to make choices concerning such offers in a limited time while being subjected to conflicting communications and surrounded by a barrage of litigation. The Williams Act is designed to protect such shareholders by giving them the opportunity to make a free and untrammeled choice through the requirement of their being given full and complete disclosure and the unhindered opportunity to make the decision whether to tender or not to tender, or to sell their shares in a freely functioning market. Neither the management of the target company nor the tender offeror are allowed to interfere with the choices available to the shareholder. Any activity which interferes with such

choice, whether through deception, or manipulation, or fraudulent acts, is prohibited. Clearly, where the alleged wrongful act is not deception, the Court must examine the facts to determine whether or not the act improperly interfered with the choices available to the target company shareholders, including the freely functioning marketplace.

A number of cases have declined to follow the Mobil analysis: Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir. 1983), cert. denied, 104 S.Ct. 550 (1983); Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 5 (2d Cir. 1983), cert. denied, 104 S.Ct. 1326 (1984); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied 454 U.S. 1092 (1981); Dan River, Inc. v. Icahn, 701 F.2d 278, 288 (4th Cir. 1983); Feldbaum v. Avon Products, Inc., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,637, at 99,235 (8th Cir. August 24, 1984).

Many of these cases are factually distinguishable from the instant suit and

the comments of those Courts are dicta.** To the extent that these cases have all rested their comments on their perception of this Court's reasoning and holding in Ernst & Ernst v. Hochfelder, 425 U.S. 185, and Santa Fe Industries, Inc. v. Green, 430 U.S. 462, we submit they have misread those cases.

Both Ernst & Ernst and Santa Fe dealt only with the construction of Section 10(b) of the 1934 Act. Neither case purported to construe Section 14(e). As we have already noted at page 33, supra, the language of Section 10(b) is different than the language of Section 14(e). The legislative history of Section 14(e) clearly reflects an intention to encom-

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**Thus, Buffalo Forge involved a suit by a successful tender offeror to rescind a stock and option sale made by target management to a competing bidder; Panter involved only the withdrawal of a single tender offer and a claim for damages due solely to the "lost tender offer opportunity."; Dan River involved a suit by target management against the takeover group to prevent the exercise of voting rights to shares in the target.

pass and regulate behavior which goes beyond deception. The purpose of Section 10(b), on the other hand, is to encourage full disclosure in order to enable the trading process to proceed unhindered. Section 14(e) has purposes defined by the Court "to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." Edgar v. MITE Corp., 457 U.S. at 634.

In view of the differences in language and purpose between these two Sections, it is submitted that the Ernst and Santa Fe analysis is inapplicable to Section 14(e) cases, and reliance by the courts upon them in Section 14(e) issues is inappropriate.

We assume that respondents will contend in this Court, as they have contended in the Courts below, that our construction of Section 14(e) will cause the federal courts to intrude upon tender offer contests each time there is revision of a tender offer because there will

be an impact or effect upon the market price of the target company securities. Indeed, the District Court accepted that argument, holding "...potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated..." (JA-40).

The argument and the holding simply misconstrue the thrust of petitioner's complaint. It is not contended that a tender offer, even the one at issue, can never be revised or withdrawn once made. Nor does petitioner assert that every action which affects the marketplace is manipulative. What makes the facts of the instant action so egregious is that the cancellation and reissuance of Burlington's tender offer: (i) occurred after the offer had run its course, was fully subscribed, and had become legally binding; and (ii) served no purpose other than enabling El Paso's management and the bidder to protect themselves; (iii) at the expense and to the injury of El Paso's shareholders and investors.

There is no dispute that the cancellation and reissuance of the Burlington/R-H tender offer was intentional and manipulative. Indeed, the District Court found "it is true that defendants' activities with respect to the tender offer did influence the price of the stock" (JA-40). Although every investment decision impacts the market, that rationale cannot justify the decision below. What occurred was a deliberate manipulation or fraudulent act which resulted in an artificial impact on the market.

C. To Require Deception Or Nondisclosure As An Element Of Wrongful Conduct Is To Relegate Injured Parties Of Manipulative And Fraudulent Acts To Inappropriate, Inconsistent And Constitutionally Inadequate Remedies

To dismiss this action is to relegate petitioner and the other El Paso shareholders who tendered their shares in the December offer to multiple lawsuits in various states throughout the nation. Since the Burlington/R-H offer was made nationwide, it can be assumed that there were El Paso shareholders in most, if not

all, of the states. Each state could, theoretically, be the forum for litigation arising out of the misconduct of respondents. These lawsuits would involve not only laws of each state which might be in conflict, but the results of such parallel litigation could also lead to inconsistent and unfair results. Thus, one state could determine respondents' conduct was legal, while another state could decide the same conduct was illegal, and the measure of damages would almost certainly vary from state to state. Some states may have regulatory statutes purporting to regulate respondents' conduct which differ from every other state. Moreover, such multiple lawsuits would involve the parties in laborious, lengthy and uncertain litigation, which could impede and delay the ultimate conclusion of any tender offer.

To allow such inconsistent state action to overlap the tender offer area covered by the Williams Act, leads not only to extraordinary burdens upon interstate commerce in securities transactions related to tender offers, but

also interferes with the regulatory scheme encompassed by the Williams Act.

The purpose of the Williams Act was to ensure uniform treatment and a rapid resolution of all tender offer disputes. If this Court rejected the attempts by states to regulate tender offers, it must equally follow that any attempt by states to fashion remedies in the tender offer context, including damages, on an inconsistent and non-uniform basis must also be rejected. See Edgar v. MITE Corp., 457 U.S. 624; A.B.A Subcomm. on Proxy Solicitations and Tender Offers, Fed.Reg. of Sec. Comm., State Takeover Statutes and the Williams Act, reprinted in 32 Bus.L. 187 (1976); The Federalist No. 80, at 341 (A. Hamilton) (C. Beard ed. 1948); Gold, Clear Water, Federalism and the Res Judicata Impact Of State Judgments in Federal Environmental Litigation, 16 U.C.D. L. Rev. 1, 19 (1982); Sedler, Rules of Choice-of-Law Versus Choice-of-Law Rules: Judicial Method In Conflicts Torts Cases, 44 Tenn. L. Rev. 975, 1036 (1977).

Indeed, without federal control and uniform regulation of manipulative and fraudulent acts in the tender offer context, the free flow of market forces and the free market mechanism will be restricted and become ineffective. See Wilner & Landy, The Tender Trap: State Takeover Statutes And Their Constitutionality, 45 Fordham L. Rev.1 (1976). See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526 (1959); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) reh'g denied, 431 U.S. 925 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Edgar v. MITE Corp., 457 U.S. 624; Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317-18 (1981).

We assume that respondents will allude to the pendency of several lawsuits in the Delaware Chancery Court, purporting to sue respondents for breach of fiduciary duty and breach of contract. The existence of the state litigation is, if anything, illustrative of the above and further explains why the Williams Act must, in effect, preempt such state action

with respect to a tender offer. In the first place, it is significant to note that the case at bar was commenced prior to any Chancery Court litigation. The Chancery Court litigation in no way includes, nor could it encompass, any federal claims.

Secondly, while the Delaware Chancery Court lawsuits were brought as putative class actions, there are substantial questions concerning collusion between the litigants. Respondents and the plaintiffs in the state court litigation stipulated, ex parte, to class status, which, while approved by the Court, was made without notice to any member of the putative class and without affording any such member an opportunity to be heard respecting the adequacy of representation and whether such member wished to "opt out". In sum, the Delaware Chancery Court has constructed, on ex parte consent, a class consisting of thousands of tendering El Paso shareholders across the nation without notice and without an opportunity for any of the putative class members to opt out of the class or decide

whether they wish the particular plaintiff to be their representative. Nonetheless, it appears that Delaware will now assert jurisdiction and the result of any decision therein would be res judicata across the country.

Significantly, Delaware's sole contact with the dispute is that Burlington, R-H and El Paso were incorporated there and Delaware was the situs of litigation between Burlington and El Paso over the attempt by El Paso to issue shares of preferred stock in order to defeat the tender offer. However, the tender offer was made nationwide and was not limited to Delaware. Most of the tendering shareholders do not reside in the forum state. Indeed, probably very few members of the putative class have any contact with Delaware.

Such an attempt to assert jurisdiction and adjudicate a controversy involving thousands of non-Delaware residents with no significant contacts in Delaware violates the Fourteenth Amendment and the principles of jurisdiction ennunciated in International Shoe Co. v. Washington, 326

U.S. 310 (1945) and Shaffer v. Heitner, 433 U.S. 186 (1977). State court adjudication of the putative class action is constitutionally defective for the additional reason that no notice was provided to members of the class to permit them the opportunity to opt in or out and to determine whether the particular plaintiff will be an adequate representative. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950). The failure of the state court to observe even the most rudimentary constitutional safeguards requires that any judgment rendered in such litigation be denied any collateral effect. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); Hansberry v. Lee, 311 U.S. 32, 45 (1940).

II

THE ACTS AT BAR VIOLATED SECTION 14(e) OF THE WILLIAMS ACT, EVEN THOUGH DISCLOSURE WAS MADE

The Courts below never considered whether or not the acts alleged in the complaint constituted manipulation. Peti-

tioner was never given any opportunity to conduct discovery or to submit evidence demonstrating that the acts alleged in the complaint were manipulative or fraudulent in violation of Section 14(e). The Courts below assumed that the acts constituted manipulation, but held that since the acts had been disclosed, there was no actionable wrong under Section 14(e). We have shown in Part I, supra, that the statute is otherwise. We shall demonstrate below that the allegations of the complaint set forth a valid claim for manipulative or fraudulent acts.**

**This Court has held that a complaint is sufficient to withstand a motion to dismiss for failure to state a claim if under any conceivable facts encompassed by the pleading, plaintiff can recover. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Collusive Agreement To Withdraw Fully Subscribed Tender Offer And Substitute Offer Detrimental To Target Company Shareholders Violates Section 14(e) Of The Williams Act, Even If Disclosed

The fundamental premise underlying the Williams Act and, indeed, all securities legislation, is that the maintenance of a free and competitive market is essential to the protection of the investor. Manipulation of the tender offer process is prohibited under the Williams Act because such acts are designed to stifle free market competition and "frustrate the exercise of an informed choice" by target investors. Edgar v. MITE Corp., 457 U.S. at 634 (1982). In the case at bar, the sale of target stock and lock-up options by the issuer was a manipulative or fraudulent act under Section 14(e) because these acts were intentional and deliberate, profited fiduciaries and others under obligation to El Paso shareholders and did, in fact, artificially limit free market competition for the shares of the target.

There are certain factors evident in this litigation which clearly demonstrate the wrongful nature of respondents' conduct. This action does not involve the mere revision or renegotiation of a pending tender offer, nor does it involve a claim of mere breach of fiduciary duty.

This is a case where the deadline for proration of the tender offer had passed, with the offer being fully subscribed. The tender offer had run its course, and Burlington had won. Notwithstanding the sporadic attempts by El Paso to continue litigation elsewhere, Burlington had made it clear that it proposed to proceed with the subscribed tender offer come what may. The market price of El Paso stock duly reflected that. No one else would tender for El Paso. Those who had subscribed had no other place to go. It was only then, after the tender offer had become a fait accompli that El Paso management entered into negotiations with Burlington. Thus, in effect, the El Paso management was playing a "heads I win, tails you lose" scheme attempted by the stock purchasers in A.T. Brod & Co. v.

Perlow, 375 F.2d 393, 395 (2d Cir. 1967).

El Paso rejected the December tender offer and resisted the takeover bid of Burlington. Obviously, if El Paso had succeeded in resisting the tender offer, no further negotiation would have ensued. But since they lost, El Paso management simply entered into an agreement with the bidder to manipulate the already fully subscribed tender offer to comport with their own personal interests. By so acting, they substituted their own self-serving agreement for the one chosen by target shareholders. Surely, the disclosure of El Paso's private agreement with Burlington after the fact cannot remedy the injuries suffered by the shareholders who had tendered their shares in the December tender offer. The disclosure provisions of the securities laws, which were meant to permit shareholders to make intelligent investment decisions, can be of no use when shareholders are faced with no alternative but to accede to management's will. The Sixth Circuit in Mobil Corporation v. Marathon Oil Co., observed the same discrepancy:

> It may be that the Marathon shareholders in this case have now been fully informed that their management granted USS the Yates Field option and the stock option. They may now understand fully how these options deter any tender offers higher than $125 per share. Yet, they have had no real alternative to accepting the USS offer, because Mobil's offer of $126 is conditional upon the invalidity of the options, and there is and could be no other comparable tender offer as long as the "lock-up options" remain in effect.

669 F.2d at 376-77 (emphasis added).

There is another reason that the decision of the Court below should not stand. In a "heads I win, tails you lose" scheme in which management can play both sides of the field, the carefully balanced scales between management of the target firm and the tender offeror designed for the protection of the shareholders and investors, become weighted in favor of management of the target firm. There is no longer any impetus for management to fairly evaluate any offer or to negotiate with a tender offeror, because

they can simply wait to find out whether the hostile tender offer will succeed. If it does not succeed, target management is spared from taking any action. If the hostile tender offer does succeed, as here, then after the fact, target management can approach the other corporation with terms more favorable to themselves and the tender offeror. This solution would have a particularly strong attraction to target management because cancellation of the original tender offer could be seen as "fit punishment" for those black sheep shareholders who went along with the hostile tender offer in the first place. Certainly it cannot be disputed that such a rule would deter investors from becoming involved in hostile tender offer bids because they are left with absolutely no protection from the manipulative machinations of target management and the tender offeror, even if the hostile tender offer succeeds.

This type of manipulative practice, in which "heads I win, tails you lose" scheme can be effected, has an unsettling effect on the marketplace. As the Second

Circuit observed in another context, in A.T. Brod & Co. v. Perlow:

> [T]he artificial demand created by purchasing securities which are not to be paid for unless the market value of the stock rises, can have an unsettling and potentially manipulative effect on the securities market -- contrary to the very purpose of the Act. The practices allegedly engaged in by the Perlows represent a violent form of speculation which serves no useful purpose except that the speculator always holds the trump card.

375 F.2d at 397.

Similarly, a holding that permits the management of a target corporation to "hold the trump card" until after a hostile tender offer has been accepted can only inject great uncertainty into the securities market, for no lawful purpose.

B. Sale Of Target Company Stock And A Lock-Up Option By Target Management During Pending Tender Offer Violates Section 14(e) Of The Williams Act, Even If Disclosed Where Free Market For Target Shares Is Artificially Limited.

It is clear that the agreement by Burlington/R-H to terminate the completed December tender offer and issue the revised offer was made specifically in consideration for the agreement by target management to sell 4.16 million shares of unissued stock and an option to purchase an addition 4.95 million shares of El Paso stock to Burlington/R-H. This stock and option sale, made contingent upon the termination of the fully subscribed December tender offer and the submission of the revised offer, allowed Burlington/R-H to assume control of the target upon the purchase of only 21 million shares in the January tender offer. The combination of the stock and option transactions, gave Burlington/R-H control over a substantial block of target stock during the pending tender offer and effectively foreclosed competitive bidding for shares of the

target. Indeed, the termination of the completed December offer and the immediate reissuance of the revised offer was deliberately timed to thwart competitive bids for El Paso stock and to deter any action contemplated by target investors to reinstate the fully subscribed December offer.

The stock and option agreements negotiated in the case at bar were an integral part of the respondents' manipulative scheme. By the grant of the stock and option sales, target management assured the success of the revised January offer even though substantially fewer shares were sought in the January offer, because the favored bidder already possessed effective control over a substantial block of El Paso stock. The sale of unissued stock and options also lessened competitive pressure in the market for target stock and set an artificial price ceiling in the tender offer market because the favored bidder need to acquire only 21 million shares from the target investors to achieve control, instead of

the 25.1 million original sought in the December tender offer.

The stock and option agreements also acted as an effective deterent to any other potential tender offerors who were placed at a considerable competitive disadvantage compared to the favored bidder. Since the stock and option sales here allowed the favored bidder to control a substantial block of target shares upon the termination of the December tender offer, Burlington/R-H needed to acquire only 21 million additional shares from target investors in the revised offer to win control of El Paso. Any potential, competing tender offeror, on the other hand, would have to acquire more than 30 million shares from target investors, at a price presumably in excess of $24 per share, just to equal the number of shares controlled by the favored bidder. By making it prohibitively expensive for a competitive bidder even to attempt a tender offer, these collusively arranged lock-up options and stock sales distorted the bidding process and depri-

ved target investors of a competitive market for their shares.

The foregoing conduct is no different than that which the Sixth Circuit struck down in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (1981).

In the Williams Act, Congress sought to establish a regulatory framework designed to encourage free and unrestrained competition in the tender offer process. It was expressly intended that the shareholders of the target, not incumbent management or the bidder, be the ones to decide the contest for control. Lock-up options and stock sales, like those at issue here, effectively disenfranchise target shareholders by ensuring in advance that the only bid capable of success is the one favored by target management. The inherently manipulative nature of these lock-up agreements may be measured in the case at bar by the absence of competitive bids for El Paso stock. Since these collusive agreements served to deter competitive offers, petitioner can only speculate as to the number of

competing bids that would have been made were it not for these lock-up arrangements.

The disclosure of the existence of these lock-up options and stock sales cannot serve to validate the use of these tactics under the facts of this case for at least three reasons: Firstly, target investors were not informed of the existence of these lock-up agreements until after they had been agreed by target management, and at a time when it was already too late for the shareholders to take action. Secondly, disclosure was an essential part of this scheme, because competing bids could not be deterred until the existence of these lock-up agreements was made known to the public. Thirdly, disclosure was specifically intended to encourage target investors to tender their shares to the favored bidder rather than await competing offers because the existence of these agreements would be recognized by target investors to bar any realistic possibility of competing bids. It may be true that target investors were fully informed of the sale

of target stock and lock-up options, but collusion between target management and the favored bidder left target investors with no realistic alternative but to accept the offer favored by management, despite disclosure.

The only profiting entities from this conduct were El Paso management and Burlington/R-H, while the only injured parties were El Paso shareholders who are the intended beneficiaries of the Williams Act provisions.

The lock-up agreements entered into by respondents constitute a deliberate attempt to subvert the auction process and deprive target investors of the benefits of free and unrestrained competition for their shares. The lock-up arrangements here, effectively deterred all competitive offers and left target investors with no real alternative but to submit to the collusive scheme and tender their shares to the bidder favored by target management. It is respectfully submitted that such practices committed in connection with the tender offer are manipula-

tive acts prohibited by Section 14(e) of the Williams Act even though disclosed.

C. Failure To Disclose Golden Parachute Contracts Awarded To Target Management And Other Tender Offer Manipulation Violates Section 14(e) Of The Williams Act And Applicable SEC Rules

The Williams Act requires the tender offeror to disclose material information to the shareholders of the target company so that target investors will be in a position to make an informed choice in the tender of their shares. In the case at bar, the withdrawn December tender offer and the revised January offer were essentially two sides of the same coin. These offers were, in effect, the same offer, except that the revised offer sought 4.1 million fewer shares (at the same "inadequate" price) and the inferior January offer had the support of management, but the December offer did not. In violation of the disclosure provisions of the Williams Act, the revised tender offer failed to disclose the material terms or ratification by the offeror of certain Golden Parachute contracts, and omitted to disclose the fact that target manage-

ment procured the withdrawal of the December tender offer specifically to permit the individual respondents to tender their shares withheld in the prior offer and to assure ratification of these Golden Parachute contracts. Such omissions of material fact served to mislead target investors in violation of Section 14(e) of the Williams Act.

The Courts below erroneously held that petitioner's nondisclosure claims were not actionable because the omissions were viewed as not causally related to petitioner's damages. It is respectfully submitted that the Courts below misconstrued the nature of the transactions at issue. The damages alleged at bar were not the result of one tender offer or the other taken alone, but resulted from respondents' course of conduct that led to the termination of the December tender offer and the submission of the revised January offer.** The failure of the

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**The District Court mistakenly analogized the case at bar to Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied, 454 U.S. 1092 (1981)
(Footnote continued on next page.)

respondents to make full disclosure in the revised offer was an essential part of the collusive scheme which damaged target investors, because omission of these material facts deprived El Paso shareholders of their right to make an informed choice in the revised offer. Since the damages caused to target shareholders resulted from the combination of the withdrawn offer and the submission of the revised offer, omissions of material fact in the January offer and the preceding period were causally related to the damages alleged at bar. Although the Courts below disclaimed any judgment concerning the materiality of the omissions at issue here, it is evident that these nondisclosures were material under the

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(Footnote continued from previous page.)

and Lewis v. McGraw, 619 F.2d 192 (2d Cir. 1980), cert. denied, 449 U.S. 951 (1980). These cases are inapposite since both involved only the withdrawal of a single tender offer, and neither involved the resubmission of a revised offer or allegations of collusion between target management and the offeror which distinguish the case at bar.

facts of this case. The failure of the tender offeror to disclose the terms and ratification of the Golden Parachutes contracts, as well as the fact that target management had procured the withdrawal of the December tender offer, were material omissions because there is a substantial likelihood target investors would have considered such information important in deciding how to vote in the revised tender offer. In addition, target management violated Rule 14(e)-2** by failing to promptly notify target investors of the material change in their position regarding the tender offer and

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** Codified at 17 C.F.R. §240. 14e-2 (1984). The SEC believes that the position of the target company can have a determinative effect on the outcome of a tender offer, and accordingly, target management should not be allowed to "state its position when it maximizes its tactical advantage and to remain silent when it does not... Such complete discretion increases the likelihood for ...fraudulent, deceptive, or manipulative acts." See, Securities Act Release No. 6158, Fed. Sec. L. Rep. (CCH) ¶82,373 at p.82,599 (December 19, 1979).

the factual reasons for such change which deprived El Paso shareholders of the opportunity to withhold their vote in the revised offer and seek reinstatement of the December tender offer.

For the foregoing reasons, it is respectfully submitted that respondents violated the disclosure provisions of Section 14(e) of the Williams Act and Rule 14(e)-2 in failing to disclose material facts concerning the withdrawn December tender offer and the revised January offer.

CONCLUSION

The conduct of respondents plainly violated Section 14(e) and every reason compels the conclusion that the judgments of the Courts below be reversed.

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